IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1033 of 1984
With
FIRST APPEAL No. 842 of 1997
With
FIRST APPEAL No. 845 of 1997
With
FIRST APPEAL No. 848 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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UNION OF INDIA - Appellant(s)
Versus
PATEL DAHYABHAI MOHANLAL & 1 - Defendant(s)

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Appearance :

NOTICE NOT RECD BACK for Appellant(s) : 1,MS MEGHA JANI for Appellant(s) : 1,
None for Defendant(s) : 1,
MR PV NANAVATI for Defendant(s) : 2,
MR VIBHUTI NANAVATI for Defendant(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 31/08/2006

COMMON ORAL JUDGMENT

1. As common question of law and facts arise in this group of appeals, they are being disposed of by this common judgment and order.

2. First Appeal No. 1033 of 1984 is filed by the appellant – original defendant (hereinafter referred to as “the defendant”) challenging the judgment and decree passed by the learned City Civil Court, Ahmedabad, dated 26th December, 1983 passed in Civil Suit No.2721 of 1981 in decreeing the said suit directing the appellant herein to pay Rs.33,351.50 ps together with interest at the rate of 6% per annum to the plaintiffs. So far as rest of the First Appeals i.e. First Appeal Nos.842 of 1997, 845 of 1997 and 848 of 1997 are concerned, they are filed by the opponent No.1 herein – original plaintiff No.1 challenging the respective judgment and decrees passed by the learned City Civil Court, Ahmedabad, passed in Civil Suit Nos.2639 of 1983, 1341 of 1983 and 4415 of 1983 in dismissing all the aforesaid suits.

3. The original plaintiff No.1 – Patel Dahyabhai Mohanlal, a partnership firm, filed the aforesaid Civil Suits against the Union of India and the Railway Administration. It is to be noted that the Civil Suit No.2721 of 1981 was filed by the insurance company also along with the aforesaid partnership firm and rest of the suits were filed by only the aforesaid partnership firm. The aforesaid suits were filed by the original plaintiffs claiming a decree for valuation of the goods and the interest thereon i.e. the goods which were transported through railway and which according to the plaintiffs were lost and/or there was a shortage of delivery. To appreciate the facts, the facts of Civil Suit No.2721 of 1981 are narrated. It was averred by the plaintiff that it carries on business as a wholesale cloth merchant and it booked one bale of cloth as parcel by passenger train in the ordinary course of business on 18th July, 1979 for which parcel bill No.194101 was issued. It was further averred that its actual weight was 81 kgs and the chargeable weight was

noted to be 81 kgs and it was consigned to self at Banswada out agency. It was properly packed in accordance with the prescribed rules and the Railway Administration. The goods dispatched in the parcel were worth Rs.34,451.50 ps. It was insured with the United India Insurance Co Ltd. It was further averred that the said parcel should ordinarily reach its destination within a week from its booking. The said parcel was, however, not delivered at the destination. The out agency at Banswada was served through the Railway Station at Ratlam and the agent of the out agency at Banswada offered to the plaintiff No.1 one wooden case weighting 41 kgs bearing railway marking ADK 194101 received on 15th August, 1979 and insisted the plaintiff No.1 to take its delivery. It was further averred that the plaintiff No.1 after examining the said wooden case offered to it for delivery informed the agent of the out agency at Banswada that the case offered to it was not the consignment which was booked at Ahmedabad by it as it was a bale of cloth while the consignment offered to it for

delivery was a wooden case and that there was a vast difference in weight between the two. It was further averred that the plaintiff No.1 made complaint to the authorities and the Higher Authorities by several letters regarding non-delivery of the suit consignment but the Railway Administration failed to deliver the said goods i.e. the bale booked as parcel by plaintiff No.1. It was further averred that the plaintiff No.2 paid the claim amount to the plaintiff No.1 by virtue of the contract of insurance between them and the letter has passed in favour of the former a letter of subrogation and a special power in favour of the former for recovery of claim amount from the defendant in the suit. It was further averred that the suit notice was served upon the Railway Administration, however, the said amount was not paid and therefore, the aforesaid suit was filed. It is required to be noted that so far as other suits are concerned, as stated above, they were filed by a partnership firm only as the amount was not paid by the insurance company as was done in Civil

Suit No.2721 of 1981. It is required to be noted that on the very date i.e. on 18th July, 1979 different consignments were sent and with regard to each consignment similar thing has happened and there was the allegation with regard to short delivery and change of consignment was made.

4. The suit was resisted by the Railway Administration by filing written statement at Exh.12. It was contended that the suit parcel contained terri-cotton goods which were included in Schedule II of the Railways Act and were classified as excepted articles and as such the Railway Administration is exonerated from its liability by virtue of Section 77(B) of the Railways Act. It was further contended that the aforesaid partnership firm was a mere commission agent and was therefore not entitled to file the suit as the owners of the goods in question. It was further contended that the aforesaid partnership firm also sent goods to Varanssi, Kanpur and Vilaspur in the same way in which the

goods were sent and in all those cases it met with the same fate and the consignee at each place was found to be unknown. According to the defendant, the alleged bale booked, therefore, did not contain cloth of Rs.34,451/- as alleged but contained something else and that the aforesaid partnership firm has preferred the false and exaggerated claim to recover the amount from the Railway Administration and therefore, it was requested to dismiss the suit.

5. The learned trial Court raised the issues at Exh.13. One Shri Dahyabhai Mohanlal Patel – partner of the aforesaid partnership firm was examined at Exh.38. No other oral evidence was adduced on behalf of the plaintiffs. On behalf of the defendant – Railway Administration as many as eight witnesses came to be examined. Shri Danabhai Nathabhai was examined at Exh.56, Shri Jagdish Ochhavlal was examined at Exh.58, Shri Savaikhan Amirkhan was examined at Exh.62, Shri Bhimeen Bisenlal was examined at Exh.69, Shri Rameshchandra was examined at Exh.76, Shri

Manilal Pursottamdas Patel was examined at Exh.82, Shri Davisinh Bhavarsinh Meena was examined at Exh.83 and Shri Hariprasad P. Trivedi was examined at Exh.84. Both the sides produced certain documentary evidence also. Though the learned trial Court observed and held that these admitted facts undoubtedly raise a strong suspicion about a fraud having been played by plaintiff No.1 or on the part of the plaintiff No.1, still there was no issue framed and the learned trial Court decreed the Civil Suit No.2721 of 1981. The learned trial Court did not agree with the contention on behalf of the Railway Administration with regard to applicability of Section 77(B) of the Railways Act as it was a case of non-delivery of the suit parcel and therefore, it does not fall within the purview of Section 77(B) of the Railways Act and therefore, the Railway Administration was not entitled to exoneration from its liability in respect of the suit parcel by virtue of Section 77(B) of the Railways Act.

So far as other civil suits are concerned, the learned trial Court accepted the contention on behalf of the Railway Administration with regard to applicability of Section 77(B) of the Railways Act and accordingly, dismissed the suits. The learned trial Court also held while dismissing the aforesaid suits that the consignee was under an obligation to describe the goods in question as belonging to the "accepted category" under Schedule II appended to the Railways Act and as the partnership did not disclose this fact while dispatching the goods in question, they would not be entitled to claim any damage from the Railway Administration as well as the insurance company.

6. Being aggrieved and dissatisfied with the judgment and decree passed by the learned City Civil Court passed in Civil Suit No.2721 of 1981 in decreeing the said suit, the Railway Administration has preferred the First Appeal being First Appeal No.1033 of 1984 and being aggrieved and dissatisfied with the judgment and

decree passed by the learned City Civil Court in aforesaid Civil Suit Nos.2639 of 1983, 1341 of 1983 and 4415 of 1983 in dismissing the said suits, the original plaintiff – partnership firm has preferred the respective First Appeals.

7. Ms. Megha Jani, learned advocate appearing on behalf of the Railway Administration, has submitted that the learned trial Court has committed an error in holding that Section 77(B) of the Railways Act would not be attracted as it is a case of non-delivery of goods. It is submitted by her that it is an admitted position and even according to the plaintiffs, the goods were offered to it but as the lesser quantity was offered, the plaintiff did not accept the same, meaning thereby, it was not a case of total non-delivery but it was a case of lost if at all and therefore, Section 77(B) of the Railways Act would be attracted. It is also further submitted by her that inspite of a clear-cut finding by the learned trial Court with regard to fraud played by the original

plaintiff and/or on his behalf in connivance with the Office of the Railway Administration, still the learned trial Court has decreed the suit as no specific issue was framed and therefore, it is submitted that the learned trial Court has committed an error in decreeing the suit. It is also further submitted by her that as the goods in question was textile and blended goods and therefore, the original plaintiff was under an obligation to describe the goods in question as belonging to the "accepted category" under Schedule II appended to the Railways Act and they were required to disclose the fact while dispatching the goods in question and even accepted fare was also not paid and therefore, they were not entitled to any damage. It is submitted by her that the learned trial Court has rightly dismissed the aforesaid civil suits being Civil Suit Nos.2639 of 1983, 1341 of 1983 and 4415 of 1983 and therefore, it is requested to allow the First Appeal No. 1033 of 1984 and to dismiss First Appeal Nos.842 of 1997, 845 of 1997 and 848 of

1997.

8. Shri Dhaval Dave, learned advocate appearing on behalf of the plaintiffs, has vehemently submitted that so far as First Appeal No. 1033 of 1984 is concerned, the learned trial Court has rightly decreed the suit and has rightly not considered the question with regard to fraud as there was no issue raised with regard to the fraud. It is also further submitted by him that the learned trial Court has rightly considered the dispute as non-delivery of the goods and therefore, the learned trial Court has rightly held that Section 77(B) of the Railways Act would not be attracted and the Railway Administration was not entitled to the exoneration from their liability. So far as rest of the First Appeals are concerned, Shri Dave has submitted that the learned trial Court has committed an error in coming to the conclusion that the appellant was under an obligation to describe the goods in question as belonging to the “accepted category” under Schedule II

appended to the Railways Act and further that as the appellant did not disclose the said facts while dispatching the goods in question, the appellant could not be entitled to claim any kind of damage from the Railway Administration as well as from the Insurance Company. It was also further submitted by him that even if it is assumed that the appellant was under an obligation to disclose the fact that the goods in question being textile and blended material belonging to the “accepted category” under the said Schedule, the non-disclosure of the same would not ipso-facto relieve the respondent from their liability if it is established that the goods in question did not reach the destination and therefore, it is requested to dismiss the First Appeal No. 1033 of 1984 and to allow First Appeal Nos.842 of 1997, 845 of 1997 and 848 of 1997.

9. Heard the learned advocates appearing on behalf of the parties.

10. At the outset it is required to be noted that on 18th July, 1979, the original plaintiff – partnership firm sent different bales by different consignments to different places i.e. Banawada out agency, Varanssi, Kanpur and Bilaspur and in all the cases, it met with the same fate and the consignee at each place was found to be unknown and in all the aforesaid cases it was alleged by the original plaintiff – partnership firm that the goods which were dispatched by the aforesaid consignments did not reach the destination and there was a shortage of delivery and/or same goods were not reached to the destination. Now, in the light of the above, few observations and findings of the learned trial Court in Civil Suit No.2127 of 1981 are required to refer to, which is as under:-

> ***Para-11 :-*** *The partner of plaintiff No.1 has further admitted that he has been in cloth business for last about 18 years. He has further admitted that he never had an occasion to send goods through the Railway*

Administration prior to 18th July, 1979. He has admitted that he did not have any conversance with or knowledge about the procedure for dispatch of goods through the Railway Administration. He has also admitted that he did not take any help from any agent dealing in such matters. In respect of the suit consignment, the witness has admitted that he had no previous dealings whatsoever with the purchaser of the goods alleged to have been sent by him in the suit consignment. According to him, the purchaser visited his shop on 18th July, 1979. The goods were purchased and the invoice at Exhibit 39 was prepared on that very day, that is, on 18th July, 1979. An amount of Rs.1,100/- was received by plaintiff No.1 from the purchaser towards initial payment towards the price of the goods. This amount of Rs.1,100/- was admittedly not credited in the books of accounts maintained by plaintiff No.1 on that very day. The witness at Exhibit 38 has stated that it was credited that next day because the purchaser has told him that he would pay some more amount the next day. The explanation is not palatable for the simple reason that the invoice at Exhibit 39 was prepared on 18th July, 1979 and therein credit of Rs.1,100/- towards the

price of the goods was given. If the purchaser wanted to pay some more amount the next day, the invoice would not have been prepared for the balance amount. Besides, a bill of exchange was admittedly drawn on 18th July, 1979 itself for the balance amount due under the invoice at Exhibit 39. If some more amount was to be received from the purchaser on the next day, no bill of exchange would have been drawn for the balance amount due under the bill at Exhibit 39. In that case there would have been no hurry for getting the bills of exchange drawn on that very day, that is, on 18th July, 1979. This explanation for omission to credit Rs.1,100/- towards the price of the goods in the books of accounts maintained by plaintiff No.1 on 18th July, 1979 itself does smack of some mischievous design on its part.

Para-12 :- *The defendant has also led evidence in this regard. The booking clerk has been examined at Exhibit 56 as aforesaid. He has admitted that he had booked the suit consignment and the parcel way bill at Exhibit 33 was issued in that regard. He has however admitted that he did not weight the parcel as it was booked*

at the instance of his colleague named Manilal P. Patel. The witness at Exhibit 56 has further stated that he recorded the weight in the parcel way bill at Exhibit 33 on the basis of the weight mentioned in its forwarding note at Exhibit 72. He has also admitted that in all 5 parcels were booked on behalf of plaintiff No.1 on 18th July, 1979 including the suit consignment at the instance of his colleague named Manilal P. Patel. He has further stated that all parcels were packed in a case. He has however clarified that he described the consignment to be a bale in the parcel way bill at Exhibit 33 in view of the fact that it was not described as a bale in the forwarding note at Exhibit 72. He has however clarified that he inserted the work "case" into brackets after the work "bale" in the parcel way bill at Exhibit 33. The witness has further stated that his colleague Manilal P. Patel, though on leave on that day, had attended the parcel booking office on that day for the purpose of getting five parcels, including the suit parcel, booked on behalf of plaintiff No.1. It cannot be gain said that it would be the duty of the booking clerk to record the correct description of the consignment in the parcel way bill and to verify its weight. The witness at Exhibit 56 had

admittedly not done so. He seems to have relied on his colleague named Manilal P. Patel. That however would not absolve him from his duty. He has admittedly guilty of dereliction in his duties in that regard on that day.

Para-14 :- *It appears that the witness at Exhibit 38 in collusion with the witness at Exhibit 82 has played a fraud with the Railway Administration in respect of all the five parcels. The aforesaid evidence on record would be a clear pointer in that direction.*

11. Now on considering the deposition of one Manilal P. Patel, who was examined at Exh.82, who has issued the respective receipts, it reveals that he was on leave on 18th July, 1979 and inspite of that he went to the parcel booking office and got all the parcel fine booked. It also discloses that each of the parcel was described as bale in the respective forwarding note. He has also admitted in his cross-examination that none of the parcels was weighed for verification of its weight mentioned

in the respective forwarding note. It has also come on evidence and in the cross examination of the partner of the plaintiff No.1 that whereabouts the persons who were to receive the goods at the destination was not known. Now, inspite of the aforesaid finding with regard to the fraud, the learned trial Court did not consider the same on the ground that no specific plea of fraud has been taken in the written statement and that it would not be open to the defendant to raise such a contention at the stage of arguments and that no specific issue has also been framed in absence of the specific pleading in that regard in the written statement at Exh.12. Now, considering the oral as well as documentary evidence, on the basis of the evidence on record itself, the case of fraud has been made out and the learned trial Court has also held in favour of the defendant. The circumstances also clearly suggests the fraud on the part of the plaintiff – partnership firm. Under the circumstances, the learned trial Court has committed an error in not considering the

question with regard to fraud. On considering the documentary as well as oral evidence, this Court is satisfied that the original plaintiff has committed fraud with the Railway Administration in connivance with the Railway Officer i.e. Shri Manilal P. Patel. Now, in view of the aforesaid finding, the original plaintiff would not be entitled to any damage and/or decree in his favour as passed in Civil Suit No.2721 of 1981.

12. Now, so far as the contention on behalf of the Railway Administration with regard to applicability of Section 77(B) of the Railways Act and that they are exonerated from their liability as it was a case of lost if at all and it was not a case of non-delivery is concerned, it is required to be noted that even as per the plaintiff himself the Railway Administration offered the goods but the weight was different and therefore, the same was not accepted by it. Under the circumstances, it cannot be said to be a total non-delivery but at the most it can be

said to be a loss or short delivery and therefore, in the facts and circumstances of the case, Section 77(B) of the Railways Act would be attracted and the Railway Administration would be exonerated from their liability. Now, so far as other suits are concerned, it is not in dispute that the goods in question which were transported were belonging to the “accepted category” under Schedule II appended to the Railways Act and that admittedly the appellant did not disclose the said fact while dispatching the goods in question nor they paid any extra fare and did not disclose the particulars which was required to be disclosed. Under the circumstances, considering the provisions of Railways Act and non-disclosure of the particulars with regard to the goods which were dispatched by way of aforesaid consignments, the learned trial Court has rightly held that the plaintiffs are not entitled to any relief and/or decree in their favour and the learned trial Court has rightly dismissed the suits. The observations of this Court with regard to fraud

would also be applicable to rest of the aforesaid three appeals as on that very day i.e. on 18th July, 1979, goods were dispatched by different consignments/bales at different places by the very plaintiff – partnership firm and the same modus-operandi is adopted.

13. In view of the above and the fraud committed by the original plaintiff, the learned trial Court has committed an error in decreeing the Civil Suit No.2721 of 1981. Under the circumstances, the judgment and decree passed by the learned trial Court passed in Civil Suit No.2721 of 1981 is required to be quashed and set aside and the First Appeal being First Appeal No.1033 of 1984 is required to be allowed. For the same reasons, First Appeal Nos.842 of 1997, 845 of 1997 and 848 of 1997 are required to be dismissed.

14. For the reasons stated above, First Appeal No.1033 of 1984 succeeds and the judgment and decree passed by the learned City Civil Court,

Ahmedabad, dated 26th December, 1983 passed in Civil Suit No.2721 of 1981 is hereby quashed and set aside. First Appeal Nos.842 of 1997, 845 of 1997 and 848 of 1997 are hereby dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

[M.R.SHAH, J.]

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